IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1971

No. 71-[illegible]

UNITED STATES OF AMERICA,

Appellee,

vs.

MORTON MAYER SOBEL,

Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

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TOPICAL INDEX

	Page
Table of Authorities	
CITATIONS TO OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS	5
STATEMENT OF THE CASE	5
STATEMENT OF THE FACTS	11
REASONS FOR GRANTING THE WRIT	25
PRELIMINARY STATEMENT	25
I THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A RETRIAL OF PETITIONER FOLLOWING A REVERSAL OF HIS JUDGMENT OF CONVICTION ON THE BASIS OF INSUFFICIENCY OF THE EVIDENCE FOR FAILURE OF THE GOVERNMENT TO PROVE PETITIONER'S SANITY BEYOND A REASONABLE DOUBT ONCE HIS SANITY WAS PLACED IN ISSUE, WOULD SUBJECT PETITIONER TO DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT	28

II THIS COURT SHOULD GRANT CERTIORARI TO SETTLE CONFUSION AND UNCERTAINTY AMONG THE CIRCUIT COURTS OF APPEAL AS TO THE IMPORT AND EFFECT OF BRYAN V. UNITED STATES, SAPIR V. UNITED STATES, AND FORMAN V. UNITED STATES, AND THIS COURT SHOULD CLARIFY THE HOLDINGS OF THOSE CASES WITH RESPECT TO THE EFFECT OF A REVERSAL OF A JUDGMENT OF CONVICTION BY AN APPELLATE COURT FOR INSUFFICIENCY OF THE EVIDENCE AND THE CIRCUMSTANCES UNDER WHICH A NEW TRIAL MAY OR MAY NOT BE ORDERED 41

III ASSUMING, ARGUENDO, THAT A PRETRIAL OF PETITIONER FOLLOWING A REVERSAL FOR LACK OF EVIDENCE WHERE NO MOTION FOR NEW TRIAL WAS MADE, WOULD NOT SUBJECT PETITIONER TO DOUBLE JEOPARDY, THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A RETRIAL OF PETITIONER WOULD VIOLATE THE ESSENTIAL FAIRNESS OF PROCEEDINGS IN THE FEDERAL COURTS IN VIEW OF THE FACTS AND CIRCUMSTANCES OF THIS CASE 45

IV. THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAW BY THE COURT OF APPEALS REVERSING HIS JUDGMENT OF CONVICTION WITHOUT DIRECTING ENTRY OF A JUDGMENT OF ACQUITTAL WHILE IN OTHER SIMILAR CASES HAVING REVERSED WITH DIRECTIONS THAT PRECLUDED A RETRIAL 57

V. THIS COURT SHOULD GRANT CERTIORARI FOR THE PURPOSE OF SETTING FORTH STANDARDS AND LAYING DOWN GUIDELINES UNDER ITS SUPERVISORY AUTHORITY OVER THE FEDERAL COURTS AS TO THE CRITERIA TO BE APPLIED BY COURTS OF APPEAL IN DETERMINING WHETHER OR NOT TO DIRECT THE ENTRY OF A JUDGMENT OF ACQUITTAL OR REMAND FOR A NEW TRIAL IN SITUATIONS WHERE THE COURT OF APPEALS HAS REVERSED A JUDGMENT OF CONVICTION FOR INSUFFICIENCY OF THE EVIDENCE 58

APPENDIX "A" - Opinion of the Court of Appeals

APPENDIX "B" - Petition for Rehearing

APPENDIX "C" - Government's Response to Appellant's Petition for Rehearing

TABLE OF AUTHORITIES CITED

Cases	Page
Amador Beltran v. United States 320 F.2d 48 (1st Cir. 1962)	60
Argent v. United States 325 F.2d 162 (5th Cir. 1963)	18, 19 53, 61
Austin v. United States 382 F.2d 129 (D.C. 1967)	63
Bryan v. United States 338 U.S. 552 (1950)	3, 27-33, 41, 46, 52
Buatte v. United States 330 F.2d 342 (9th Cir. 1964)	18-21, 25 33, 53, 62
Carr v. United States 278 F.2d 702 (6th Cir. 1960)	61
Clark v. United States 293 F.2d 445 (5th Cir. 1961)	61
Curry v. Overholser 287 F.2d 137 (D.C. Cir. 1960)	63
Davis v. United States 382 F.2d 221 (9th Cir. 1967)	62
Douglas v. United States 239 F.2d 60 (D.C. Cir.)	63

Fielding v. United States
251 F.2d 878 (D.C. Cir. 1957) 63

Forman v. United States
361 U.S. 416 3, 27, 32
(1960) 33, 41, 46, 53

Gikas v. United States
250 F.2d 858 (1st Cir. 1957) 60

Guevara v. United States
242 F.2d 745 (5th Cir. 1957) 61

Hamilton v. United States
304 F.2d 542 (5th Cir. 1962) 61

Hartford v. United States
362 F.2d 63 (9th Cir. 1966) 54

Isaac v. United States
284 F.2d 168 (D.C. Cir 1960) 53, 64

Julian v. United States
391 F.2d 279 (9th Cir. 1968) 62

Kepner v. United States
195 U.S. 100 31

McKenzie v. United States
266 F.2d 524
(10th Cir. 1959) 53, 62

McNabb v. United States
318 U.S. 332 56

Mesarosh v. United States
352 U.S. 1 (1956) 56

Miller v. United States
224 F.2d 561 (5th Cir. 1955) 61

Musquiz v. United States
445 F.2d 963 (5th Cir. 1971) 27, 42

Phillips v. United States
311 F.2d 204 (10th Cir. 1962) 44

Ramirez v. United States
363 F.2d 33 (9th Cir. 1966) 62

Rucker v. United States
288 F.2d 146 (D.C. Cir. 1961) 63

Sapir v. United States 3, 27, 30
348 U.S. 373 32, 33, 38
(1955) 40, 41, 46, 52

Sentner v. United States
253 F.2d 310 (8th Cir. 1958) 62

Spriggs v. United States
225 F.2d 865 (1955) 63

State v. Moreno
69 N.M. 113, 364 P.2d 594
(1961) 38

Thomas v. United States
239 F.2d 7 (10th Cir. 1956) 63

Thompson v. United States
334 F.2d 207 (5th Cir. 1964) 61

United States v. Dotson
440 F.2d 1224
(10th Cir. 1971) 45, 56, 63

United States v. Dunn
299 F.2d 548 (6th Cir. 1962) 62

United States v. Goodson
439 F.2d 1056 (5th Cir.1971) 36, 60

United States v. Howard
432 F.2d 1188
(9th Cir. 1970) 51, 53
58, 62

United States v. Kram
247 F.2d 830 (3rd Cir. 1957) 60

United States v. Mayer
441 F.2d 322 (9th Cir. 1971) 62

United States v. Musquiz
445 F.2d 1963 (5th Cir. 1971) 61

United States v. Reina
172 F.Supp. 113
(S.D. N.Y. 1959) 32

United States v. Rende Ice Cream
Co., 160 F.2d 353 (3rd Cir.
1947) 60

United States v. Russano
257 F.2d 712 (2nd Cir. 1958) 60

United States v. Stroble
431 F.2d 1273 (6th Cir. 1970) 61

United States v. Westernausen
283 F.2d 844 (7th Cir. 1960) 53, 62

United States v. Williams
348 F.2d 451 (4th Cir. 1965) 60

Watkins v. United States
409 F.2d 1337 (5th Cir. 1969) 61

Yates v. United States
354 U.S. 298 (1957) 37

Codes

21 U,S.C. 174 6

26 U.S.C. 4705(a) 5

28 U.S.C. 1254 2

Constitution

United States Constitution -
5th Amendment 3, 5, 28, 40

Texts

Comment, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 1964, 31 U.Chi.L.Rev. 367 27, 35

Mayers and Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 1960 74 Harv.L.Rev. 1 27, 35

31 U.Chi.L.Rev. 367 (1964) 38

Wright, Federal Practice and Procedure (1969) Criminal §470 27

Rules

Federal Rules of Criminal Procedure,

Rule 16(a)(2) 48

Rule 16(c) 48

Rule 29 18

IN THE

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No.

UNITED STATES OF AMERICA,

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vs.

MORTON MAYER SOBEL,

Appellant.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH CIRCUIT COURT OF APPEALS

Petitioner prays that a writ of certiorari issue to review a judgment of the Ninth Circuit Court of Appeals entered in the above entitled case on July 15, 1971.

CITATIONS TO OPINION BELOW

The judgment of the Court of Appeals is reported at 443 F.2d 1370. Said opinion is printed and attached hereto and made a part hereof as Appendix A.

JURISDICTION

The Ninth Circuit Court of Appeals reversed the conviction of petitioner on July 15, 1971. Petitioner's petition for rehearing and suggestion for appropriateness of hearing en banc was denied and the suggestion for rehearing en banc rejected on October 22, 1971. The jurisdiction of this court is invoked under 28 United States Code, §1254.

Since petitioner's judgment of conviction was reversed by the Court of Appeals, the questions presented in this instant petition were not raised on the appeal, but since the questions presented by this petition are whether or not petitioner may again be retried, the questions raised herein were

presented in the petition for rehearing in the Ninth Circuit Court of Appeals.

QUESTIONS PRESENTED

1. Whether a retrial of petitioner following a reversal of his judgment of conviction on the basis of insufficiency of the evidence for failure of the government to prove petitioner's sanity beyond a reasonable doubt once his sanity was placed in issue, would subject petitioner to double jeopardy in violation of the Fifth Amendment.

2. Whether such confusion and uncertainty exists among the circuit courts of appeal as to the import and effect of Bryan v. United States, Sapir v. United States, and Forman v. United States, that this court should clarify the holdings of those cases with respect to the effect of a reversal of a judgment of conviction by an appellate court for insufficiency of the evidence and the circumstances under which a new trial may or may not be ordered.

3. Assuming, arguendo, that a retrial of petitioner following a reversal for lack of evidence where no motion for new trial was made, would not subject petitioner to double jeopardy, whether a retrial of petitioner would violate the essential fairness of proceedings in the federal courts in view of the facts and circumstances of this case.

4. Whether petitioner was denied equal protection of the law by the court of appeals reversing his judgment of conviction without directing entry of a judgment of acquittal while in other similar cases having reversed with directions that precluded a retrial.

5. Whether this court should grant certiorari for the purpose of setting forth standards and laying down guidelines under its supervisory authority over the federal courts as to the criteria to be applied by courts of appeal in determining whether or not to direct the entry of a judgment of acquittal or remand for a new trial in situations where the court of appeals

has reversed a judgment of conviction for insufficiency of the evidence.

CONSTITUTIONAL PROVISIONS

The constitutional provision involved is the Fifth Amendment to the United States Constitution. It is printed in 1 United States Code, XLVI.

STATEMENT OF THE CASE

On June 10, 1970, a four-count indictment was returned by the Federal Grand Jury in Los Angeles, California, charging petitioner with violations of 26 United States Code, §4705(a).

Petitioner was arraigned on the indictment, and after entering pleas of not guilty to each count thereof, the cause was transferred to the Honorable David W. Williams, United States District Judge, for all further proceedings.

On October 26, 1970, a superseding indictment was filed which in addition to realleging the four counts charged in the previous indictment (No. 6164), additionally charged petitioner with

two counts of violation of 21 United States Code, §174. This indictment was No. 6496 (Clk.Tr. pp. 27-32).[1/] Petitioner entered pleas of not guilty to each charge in the superseding indictment on October 31, 1970 (Clk.Tr. p. 38).

On August 25, 1970, petitioner filed a notice of motion and motion for bill of particulars (Clk.Tr. p. 13); notice of motion and motion for pretrial discovery (Clk.Tr. p. 1); and notice of motion and motion for dismissal (forwarded to the Court of Appeals for the Ninth Circuit by the clerk of the court below by cover letter dated March 24, 1971). All three motions came on to be heard by the court on August 31, 1970, the motion for dismissal being denied and the motions for pretrial discovery and bill of particulars being denied in part and granted in part (Clk.Tr. p. 38).

On September 29, 1970, trial commenced before the Honorable David W.

1/ Clk.Tr., when used hereafter, refers to the Clerk's Transcript on Appeal.

Williams and a jury and continued until October 3, 1970, at which time the jury acquitted petitioner on counts one and two of the indictment but was undecided on the four remaining counts (Clk.Tr. pp. 67-69, 137-139). When the jury was unable to agree upon a verdict by October 5, 1970, the court declared a mistrial and dismissed the jury. The cause was then submitted to the court for decision based upon the trial record, and the defendant was found guilty on the four remaining counts (Clk.Tr. p. 140).

On October 12, 1970, petitioner filed a notice of motion and motion for judgment of acquittal (Clk.Tr. p. 154), which was denied by the court on November 2, 1970, at which time petitioner was sentenced to five years in the custody of the Attorney General on each of the four counts, to run concurrently with each other. Bond pending appeal was fixed in the sum of $20,000.00 corporate surety (Clk.T. p. 156).

A notice of appeal was filed by petitioner on November 2, 1970 (Clk.Tr.

p. 158). Petitioner posted a corporate surety bond in the amount fixed by the court on November 2, 1970 (Clk.Tr. p. 171) and remained at liberty pending appeal on said bail.

On July 15, 1971, the United States Court of Appeals for the Ninth Circuit, in a per curiam opinion, reversed the judgment of conviction stating:

> "The judgment of conviction is reversed. We find the Government, once sanity was an issue, did not sustain its burden of proof."

A true copy of the said opinion is printed and attached hereto and made a part hereof as Appendix A.

Petitioner's opening brief on appeal had claimed, as its primary ground, that the trial court had erred in denying petitioner's motion for judgment of acquittal in that the Government had introduced no evidence to overcome the substantial evidence of insanity that had been presented on behalf of petitioner.

Following the reversal of the judgment of conviction, petitioner timely filed a petition for rehearing and suggestion for appropriateness of hearing en banc which sought that the Court of Appeals clarify its opinion to provide for a granting of the petitioner's motion for judgment of acquittal upon remand and to further clear up any misunderstanding by the court below as to the import and meaning of the Court of Appeals' opinion. A true copy of the petition for rehearing and suggestion for appropriateness of hearing en banc is printed and attached hereto and made a part hereof as Appendix B.

Following the filing of petitioner's petition for rehearing in the Court of Appeals, the said Court of Appeals, on September 17, 1971, requested that the Government file a response to the petition. A true copy of the Government's response to the petition for rehearing is printed and attached hereto and made a part hereof as Appendix C.

On October 22, 1971, the Court of Appeals denied petitioner's petition for rehearing and rejected the suggestion for rehearing en banc.

On November 22, 1971, the United States District Court for the Central District of California, the Honorable David W. Williams, Judge Presiding, scheduled the retrial of petitioner to commence on January 4, 1972, in that court.

On November 29, 1971, Mr. Justice Doublas granted the application of counsel for petitioner and extended the time for filing this petition for Writ of Certiorari to and including December 21, 1971. The Justice further ordered, inter alia, that all further proceedings in the District Court be stayed pending the filing of this petition and if timely filed, the stay to remain in effect pending this Court's action on this petition.

STATEMENT OF THE FACTS

A most extensive recitation of the facts was set forth in the "Appellant's Opening Brief' filed on behalf of petitioner in the United States Court of Appeals for the Ninth Circuit. Since the Court of Appeals reversed the judgment of conviction, and since this petition does not therefore deal with the question of the sufficiency of evidence but rather with whether petitioner may be or should be retried, we deem it unnecessary to set forth the evidence at any great length. The facts, insofar as they are pertinent to the questions presented by this petition are as follows:

The government presented a fairly standard narcotics case in which petitioner was shown to have engaged in sale of cocaine to an undercover Los Angeles County Sheriff's Deputy and Federal Narcotics Agent.

The events and circumstances of the transactions were somewhat unique, however, in that petitioner ingested

large amounts of cocaine and smoked marijuana during the meetings with the undercover officers. Petitioner's defense was that he was insane at the time of the commission of the alleged offenses.

The petitioner presented a substantial case supporting his contention that he was insane during the transactions with which he was charged in the six-count indictment. Business associates and friends, as well as petitioner's wife, testified extensively as to petitioner's bizarre behavior, personality changes, and use of drugs during the relevant time periods. In addition thereto, a surgeon and medical doctor testified that shortly before the time of the crimes charged against petitioner, the petitioner went through a highly upsetting experience which culminated in the removal of a malignant tumor from his face which caused petitioner great anxiety and strain.

After petitioner's lay witnesses had testified on the issue of sanity, the government presented a "Motion to

Compel Defendant to Submit to Psychiatric Examination and Order" (Cl.Tr. pp. 76-81) to the court. Government counsel informed the court that should its motion be granted, he had already made an appointment with one of the psychiatrists on the panel who could examine the defendant at 8:00 a.m. the following morning and would have a report ready by 1:00 p.m. that afternoon so that proceedings would not be delayed (Rep.Tr. p. 273).[2/]

After hearing argument, the court ruled that it would grant the government's motion (Rptr.Tr. p. 280) and appointed Dr. Marcus Crahan, the government's choice of an examining psychiatrist (Rep.Tr. p. 282) even though defense counsel objected to Dr. Crahan on the ground that he was a hand-picked progovernment psychiatrist (Rep. Tr. p. 280).

The main witness for the defense was Fred Weaver, M.D., an experienced

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2/ Rep. Tr. refers to the Reporter's Transcript of Proceedings.

and eminently qualified psychiatrist who testified that the petitioner had been a patient of his from approximately one year prior to the time of the crime in question through the time of the trial and that the petitioner was, as corroborated by an extensive series of psychological tests administered by a qualified psychologist, a very sick man who was suffering from paranoid schizophrenia which was complicated by his anxiety over an operation to remova a malignant tumor from his face and the extensive use of drugs including LSD, mescaline, and cocaine. The above mentioned cancerous tumor was described by the surgeon who removed it as being a serious matter which would have terminated the petitioner's life within a year and one-half had it not been removed.

Dr. Weaver concluded his lengthy testimony on the issue of petitioner's insanity as follows (Rep.Tr. 321-322):

> "Q (by Defense Counsel) And during that period, in your opinion, or did you have an

opinion on whether or not he was suffering from a mental disease?

A (by Dr. Weaver) Yes.

Q What was that disease?

A The one that I mentioned, paranoid-schizophrenia.

Q Now, doctor, do you have an opinion as to whether or not at the time of the conduct alleged in the indictment, Mr. Sobel, as a result of mental disease, lacked the substantial capacity to appreciate the wrongfulness of his conduct?

A Yes, I have an opinion on that.

Q What is your opinion, doctor?

A That he was not responsible for his conduct during that time, as a result of mental disease.

Q Do you have an opinion as to whether or not, at the time of the conduct alleged in the indictment as a result of mental disease he lacked the substantial capacity to conform his conduct to the requirements of the law.

A I have an opinion on that." (Rep.Tr. p. 321).

"Q What is your opinion?

A That he lacked substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law. Working with Mr. Sobel over the past year and all of the things I have mentioned previously in this case, and my clinical observations in light of my training and experience.

Q Doctor, in your opinion, could Mr. Sobel have knowingly and willfully transferred or sold cocaine?

A I don't think he could, no.

Q In your opinion, doctor, could Mr. Sobel have entertained a specific intent to violate that law in the manner in which he is charged?

A I don't believe so." (Rep.Tr. p. 322).

When the testimony of Dr. Weaver

was concluded, the defendant rested and government counsel requested a conference at the bench and inquired of the court if it had signed the order to have Dr. Crahan examine the defendant (Rep.Tr. p. 358). Government counsel also requested that Dr. Crahan be provided with the same material with which Dr. Weaver had been provided to form his conclusion. It was agreed that Dr. Crahan would be furnished the requested materials.

At this point the Court asked government counsel if Dr. Crahan would be called the next day and government counsel asked for a fifteen minute recess, stating that he may have reconsidered calling Dr. Crahan. This request was granted by the court. (Rep. Tr. p. 359).

After the recess had been concluded, the court inquired of counsel as to how long their arguments would be (Rep.Tr. p. 360), and excused the jury until 9:30 A.M. the next day, which was Friday, October 2, 1970 (Rep.Tr. p. 361).

When the jury had been excused, counsel and the court went into chambers, where the defendant made a Motion for Judgment of Acquittal pursuant to Rule 29 F.R. Crim. P. (Rep.Tr. p. 362).

In arguing the Motion for Judgment of Acquittal, defense counsel stressed the holding of the Ninth Circuit Court of Appeals in Buatte v. United States, 330 F.2d 342 (9th Cir. 1964), and a case cited therein, Argent v. United States, 325 F.2d 162 (5th Cir. 1963), for the proposition that the defendant was entitled to have his motion granted as a matter of law (Rep.Tr. p. 364).

The court asked counsel for the defendant what the case (Buatte) said. Defense counsel gave the court a rough summary of the case and the holding of the Ninth Circuit Court of Appeals, and the court stated "If that is the reasoning of the case I would not follow that reasoning." (Rep.Tr. pp. 365-366). 3/

3/ The colloqy between defense counsel and the court went thusly:

 (continued)

At Reporter's Transcript, page 374, the court denied the defendant's Motion or Judgment of Acquittal and granted the

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1/ (continued)

MR. SHERMAN: My second point is that as a matter of law I think the court is going to be obliged to grant the defendant's motion for judgment of acquittal for this reason. We have a psychiatrist who, having studied the evidence that he studied, came to the conclusion that Mr. Sobel was insane as a matter of law.

We also have the corroborating testimony of lay witnesses and we have no contrary testimony.

I would like to direct the court's attention to two cases which the court may wish to look into tonight. One is a Ninth Circuit case, your Honor, and it is entitled Busette v. United States. This case is at 330 F.2d 342.

In that case they cite one other case that I wish to call the court's attention to, it is called Argent v. United States, and that is at 325 F.2d 262.

THE COURT: What happened to the proposition of law that will have to be given to the jury on the subject of expert witnesses, that they don't have to believe the expert if they find that there is not a proper basis for his expert opinion? So it is a question of fact whether they want to believe that

 (continued)

government's Motion to Withdraw its Motion for the Appointment of a Psychiatrist (Rep.Tr. p. 374).

At 12:10 P.M. on October 2, 1970,

3/ (continued)

he has a proper basis for an opinion. So with that how can you say it is a matter of law that his opinion must be followed:

MR. SHERMAN: Your Honor, I would have said unhesitatingly that I was making this as a matter of form before I read the two cases I mentioned, I just read them or I would have briefed them, but I think when the court reads these cases it will see exactly what I am talking about.

May I just point this out to you, that the doctor in this case had an awful lot more than most doctors had. He had the report of Miss Collier, he had tape which was really all of Mr. Tarallo's testimony in substance, and he had the testimony of all the lay witnesses.

Now I think that in this situation the government cannot carry the burden of proof beyond a reasonable doubt that the defendant was sane, and if the court will read the Buatte case, it came as a surprise to me, I realize the court's knowledge is larger than mine, but I think you will be quite interested in the holding of that case

(continued)

the jury had heard the arguments of counsel, been instructed on the law and retired to begin their deliberations.

3/ (continued

and I would hope that if the court's primary inclination is to not accept this point that it will reserve ruling until the reading of that case or the other case I cited.

THE COURT: Tell me what the case says.

MR. SHERMAN: In the Buatte case that was where they had more than one psychiatrist who didn't have the defendent as long as we do in this case, and the psychiatrist said the defendant was insane, it was an Indian Reservation murder case, it was the old right-wrong test, they had some lay witnesses who testified to erratic behavior which comported to the analysis of the psychiatrist.

The government presented some lay witnesses whose testimony was equivocal, as I used the word, on whether or not the defendant's actions were irrational, and the Court of Appeals simply said with the lay testimony and with the psychiatric testimony there had to be a reasonable doubt as to the defendant's sanity which was not dispelled by anything in the government's case.

I think the government there probably had a better case than it does here.

(continued)

The jury returned at 3:20 P.M. the same day and requested that certain portions of Dr. Weaver's testimony and the instruction on insanity be reread to them (Rep.Tr. p. 485).

Court was called into session at 9:35 A.M. the next morning and the testimony of Dr. Weaver was reread and the instruction on insanity was again given by the court along with a brief explanation of the various counts and the jury again retired to resume its deliberations (Rep.Tr. pp. 491-499).

3/ (continued)

THE COURT: If that is the reasoning of the case I would not follow that reasoning.

MR. SHERMAN: It is a Ninth Circuit case, your Honor. But I would still respect any ruling that your Honor would make. I think it is certainly worth looking into, however.

THE COURT: I am interested in the order form argument. What about that?

At 4:05 P.M. the jury announced that it had reached a verdict on two counts of the indictment but was unable to reach a verdict on the remaining four counts. The court ordered the verdict on the two decided counts to be returned (Rep.Tr. p. 500), which was not guilty as charged in counts 1 and 2 of the indictment (Rep.Tr. p. 501). After each juror indicated they felt a decision could not be reached on the remaining four counts (Rep.Tr. p. 502), the court read the "Allen" instruction and excused the jury until Monday, October 5, 1970 at 9:30 A.M. (Rep.Tr. pp. 503-507).

The jury resumed deliberations October 5, 1970 at 9:35 A.M. and returned to the courtroom at 12:15 P.M. that same day and announced that they could not reach a verdict but handed the court a note to read (Rep.Tr. p. 515). The contents of said note are set forth at Reporter's Transcript, page 517 and the court's response is set forth at Reporter's Transcript, page 516. At 2:25 that same afternoon, the jury

returned and stated that they could not reach a verdict on the remaining counts (Rep.Tr. p. 519) and the court declared a mistrial (Rep.Tr. p. 521).

The defendant again renewed his Motion for Judgment of Acquittal (Rep. Tr. p. 522) and the motion was again denied (Rep.Tr. p. 525).

The defendant and government counsel agreed to submit the matter to the court based upon the record (Rep.Tr. p. 527) and an appropriate stipulation was entered into (Rep.Tr. p. 528). After argument the court stated that it wasn't convinced of the defendant's sanity and found him guilty on the remaining four counts (Rep.Tr. p. 531).

On October 12, 1970, the defendant filed a Notice of Motion and Motion for Judgment of Acquittal (Cl.Tr. p. 154), which was supported by the Affidavit of Richard G. Sherman (Cl.Tr. p. 159). The motion was denied on November 2, 1970, (Rep.Tr. p. 534) and the defendant was sentenced to five years in the custody of the Attorney General on each

of the four counts to run concurrently (Rep.Tr. p. 535).

REASONS FOR GRANTING THE WRIT

PRELIMINARY STATEMENT

As may be seen from the statement of the case and statement of the facts herein, this petition involves a situation in which petitioner, who had presented extensive and overwhelming lay and psychiatric evidence of insanity, was found guilty by the trial judge after the jury had originally acquitted petitioner on two of the six counts and was unable to agree on the remaining four. Although petitioner's counsel extensively briefed and argued the trial judge's duty to acquit or otherwise discharge the petitioner, the District Court, announcing, in essence, that it would not follow the law of the leading case in the Ninth Circuit on the issue, (Buatte v. United States, 350 F.2d 389 (9th Cir. 1964)), adjudged petitioner guilty. The Court of Appeals reversed

but did not direct the petitioner's discharge.

Should petitioner now be required to face a retrial merely because the district judge failed and/or declined to perform his duty to grant a motion for judgment of acquittal?

Moreover, it must be noted that the government here deliberately chose to bypass its opportunity to obtain pre-trial production of petitioner's medical tests and psychiatric reports and further deliberately chose to bypass its opportunity to present evidence (either expert and/or lay) on the issue of petitioner's sanity, although afforded every opportunity to do so by the trial court.

The issues raised by this petition pose questions which have not previously been clearly answered by either this court or the lower courts of the federal system. The questions have been dealt with in law review articles which have

been oft-cited by the courts,[4] but the answers to the issues presented herein have continued to perplex the circuit courts of appeal[5] and the leading text on federal practice and procedure has evidenced that the answers to the questions raised herein have not been clearly defined.[6]

The declarations of this court on the questions presented herein have left the issues unresolved.[7]

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[4] See Comment, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 1964, 31 U.Chi.L.Rev. 367, and Mayers & Yarbrough, Bis Vexari: New Trials and Successive Prosecutions, 1960, 74 Harv.L.Rev. 1, 13.

[5] See Musquiz v. United States, 445 F.2d 963, 966 (5th Cir. 1971).

[6] See Wright, Federal Practice and Procedure, (1969) Criminal, §470.

[7] See Bryan v. United States, 338 U.S. 552 (1950); Sapir v. United States, 348 U.S. 373 (1955); and concurring opinion of Mr. Justice Douglas, and Forman v. United States, 361 U.S. 416 (1960).

We respectfully submit that this court should grant certiorari to resolve the areas of uncertainty and doubt that exist among the United States district courts and courts of appeal with respect to the questions set forth herein.

I

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A RETRIAL OF PETITIONER FOLLOWING A REVERSAL OF HIS JUDGMENT OF CONVICTION ON THE BASIS OF INSUFFICIENCY OF THE EVIDENCE FOR FAILURE OF THE GOVERNMENT TO PROVE PETITIONER'S SANITY BEYOND A REASONABLE DOUBT ONCE HIS SANITY WAS PLACED IN ISSUE, WOULD SUBJECT PETITIONER TO DOUBLE JEOPARDY IN VIOLATION OF THE FIFTH AMENDMENT.

The Court of Appeals reversed petitioner's conviction in a brief per curiam opinion which stated:

"The judgment of conviction is reversed. We find the

government, once sanity was an issue, did not sustain its burden of proof."

Petitioner here had made no motion for a new trial in the district court but had made motions for judgment of acquittal which had been denied.

The question of whether a defendant, whose conviction is reversed for insufficiency of the evidence, may be subjected to retrial where, as here, he moved for a judgment of acquittal but did not move for a new trial, has been one of great uncertainty.

Three decisions of this court have failed to clarify the confusion that appears to exist on the issue, and we submit that the question is of such constitutional magnitude that it should be squarely decided by this court.

In Bryan v. United States, 338 U.S. 552 (1950), this court initially confronted the question of the constitutionality of a remand for a new trial after a reversal for insufficiency of

the evidence and concluded that where one successfully sought review of a conviction, there was no double jeopardy upon a new trial. Bryan, however, involved a situation where that petitioner had moved for a new trial below.

In Sapir v. United States, 384 U.S. 373 (1955), the Court of Appeals first reversed with instructions to dismiss the indictment. Upon rehearing, the Court of Appeals vacated that judgment and remanded with directions to grant a new trial. This Court summarily reversed stating that the earlier judgment was correct and that it was thus unnecessary to pass upon whether the Court of Appeals had power to order a new trial.

Mr. Justice Douglas, in his concurring opinion in Sapir v. United States, supra, did address himself to the constitutional question involved arguing that a new trial after an acquittal by an appellate court for lack of evidence was no different from a new trial after an acquittal by a

trial court, and that both were proscribed by the double jeopardy clause of the Fifth Amendment. Mr. Justice Douglas distinguished the Bryan case on the ground that Bryan had asked for a new trial and that such a request opened the whole record for such disposition as might be just. Pointing out that reversal by the appellate court on grounds of error that infected the trial would have compelled a different result, Mr. Justice Douglas asserted the correct rule to be that (384 U.S. at 374):

> "An acquittal on the basis of lack of evidence concludes the controversy, as the Kepner[8] case holds, and puts it at rest under the protection of the double jeopardy clause, absent a motion by the defendant for a new trial."

Several lower federal courts have been squarely presented with the

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8/ Referring to Kepner v. United States, 195 U.S. 100.

question. In United States v. Reina, 172 F.Supp. 113 (S.D. N.Y. 1959), and Rucker v. United States, 228 F.2d 146 (D.C. Cir. 1961), a new trial was awarded following a reversal for insufficient evidence even though a new trial had not been requested. Neither of these two cases either cited or dealt with the effect of Sapir v. United States and cited only Bryan v. United States.

In Forman v. United States, 361 U.S. 416, 426 (1960), however, this court appears to have adopted, as law, the concurring opinion of Mr. Justice Douglas in Sapir v. United States. Pointing out that in Forman there was no lack of evidence in the record, and that the initial reversal by the Court of Appeals was based upon the ground that the jury had been instructed in an erroneous theory of law, this court held that a new trial would not invade Forman's constitutional protection against double jeopardy and distinguished the case from Sapir v. United States, saying (361 U.S. at 426):

"On the other hand, the order to dismiss in Sapir was based on the insufficiency of the evidence, which could be cured only by the introduction of new evidence, which the government assured the court was available. Moreover, Sapir made no motion for a new trial in the district court, while here petitioner filed such a motion. That was a decisive factor in Sapir's case."

The foregoing language of Forman would appear to suggest that this court has accepted the views expressed by Mr. Justice Douglas in his concurring opinion in Sapir v. United States and that the rule of Bryan v. United is restricted to cases where a new trial is requested.

The United States Court of Appeals for the Ninth Circuit avoided a direct confrontation with the constrtutional question involved herein in Buatte v. United States, 331 F.2d 848 (9th Cir.

1964), where the court denied the government's petition for rehearing after having previously reversed and remanded with directions to enter a judgment of acquittal in a situation where the government had failed to produce sufficient evidence to support a finding of sanity (330 F.2d 342) and made the following observation:

> "Since we take this view of the petition and deny it upon that ground, it is unnecessary for us to consider the further question whether in the circumstances of this case, since this court has held that judgment of acquittal for lack of evidence should have been entered and has reversed the judgment on that ground, the granting of a new trial would violate the command of the Fifth Amendment relating to double jeopardy. See the concurring opinion in Sapir v. United States, 348 U.S. 373, 75 S.Ct. 422, 99 L.Ed. 426, as commented upon in Forman v. United

States, 361 U.S. 416, at page 426, 80 S.Ct. 481, 4 L.Ed.2d 412, and see 'Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence' 31 University of Chicago Law Review 365."

It may be noted that each of authorities cited by said court agrees with the petitioner's contentions herein.

Several oft-cited law review commentaries have discussed the issue presented herein and concluded that for the prosecution to be given second opportunity after having once failed to make a sufficient case against an accused, seems fundamentally inconsistent with the double jeopardy clause.[9]

9/ See Comment, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 1964, 31 U. Chi.L.Rev. 367 and Mayers and Yarbrough, Bis Vexari: New Trials and Successful Prosecutions, 1960, 74 Harv.L.Rev. 1, 13: "If the state cannot have a new trial following an erroneous acquittal, it certainly should not have this advantage when the acquittal was erroneously denied."

In United States v. Goodson, 439 F.2d 1056, 1059 (5th Cir. 1971) the Court of Appeals skirted any constitutional confrontation but citing Professor Wright, reversed with directions to enter judgment of acquittal, saying:

> "Ordinarily on this state of the facts we would remand to the court below for a new trial. However, the record reveals it is doubtful that the government can supply the defect in the evidence upon a remand. That being the case, and in view of the fact that the defendant did not ask for a new trial in the court below, Wright, Federal Practice and Procedure: Criminal Section 470 (1969), the judgment of conviction is reversed and the case remanded with directions to enter judgment of acquittal."

The question presented herein was alluded to by Mr. Justice Black concurring in part and dissenting in part in

Yates v. United States, 354 U.S. 298 (1957), in which this court reversed the convictions of five defendants directing a judgment of acquittal as to them while reversing the convictions of nine others but permitting a retrial. Mr. Justice Black, with whom Mr. Justice Douglas joined, opined, 354 U.S. 298 at 341:

> "It seems unjust to compel these nine defendants, who have just been through one four-month trial to go through the ordeal of another trial on the basis of such flimsy evidence. As the Court's summary demonstrates, the evidence introduced during the trial against these defendants was insufficient to support their conviction. Under such circumstances, it was the duty of the trial judge to direct a verdict of acquittal. If the jury had been discharged so that the government could get additional evidence in an attempt to convict, such a discharge would have been a sound

basis for a plea of former jeopardy in a second trial. See Wade v. Hunter, 336 U.S. 684, 93 L.Ed. 974, 69 S.Ct. 834, and cases cited there. I cannot agree that 'justice' requires this court to send these cases back to put these defendants in jeopardy again in violation of the spirit if not the letter of the Fifth Amendment's provision against double jeopardy."

The New Mexico Supreme Court, in State v. Moreno, 69 N.M. 113, 115, 364 P.2d 594, 595 (1961), citing Sapir v. United States, has held that:

"The effect of a reversal for lack of sufficient evidence to support a conviction is not different from an acquittal by the jury and requires that the defendant be discharged."

As the University of Chicago Law Review has concluded (31 U.Chi.L.Rev. 367 (1964):

"No undue burden is imposed on society by releasing those defendants whose convictions have been reversed for lack of evidence. The oppression and harassment which the double jeopardy clause was designed to prevent is clearly present in a new trial following a reversal for insufficient evidence. For in the insufficient evidence case an appellate court is in essence saying, 'Well, the prosecution did not prove you guilty this time but they can have another chance.' Although it would not be necessary for the Supreme Court to raise the distinction between reversal for error and reversal for insufficient evidence to the stature of a constitutional principle -- invocation of the Court's supervisory power might be considered more appropriate -- the Court should explicitly recognize that the same considerations which prohibit a new trial

where an accused has been acquitted at trial apply with equal force following an appellate reversal for insufficient evidence."

We respectfully submit that the reasoning of Mr. Justice Douglas as expressed in his concurring opinion in Sapir v. United States, supra, should be adopted by this court and that this Honorable Court should grant certiorari to determine whether a retrial of the petitioner following a reversal of his judgment of conviction on the basis of insufficiency of the evidence for the failure of the government to prove his sanity beyond a reasonable doubt once the question of petitioner's sanity was placed in issue, would subject petitioner to double jeopardy in violation of his Fifth Amendment rights.

II

THIS COURT SHOULD GRANT CERTIORARI TO SETTLE CONFUSION AND UNCERTAINTY AMONG THE CIRCUIT COURTS OF APPEAL AS TO THE IMPORT AND EFFECT OF BRYAN V. UNITED STATES, SAPIR V. UNITED STATES, AND FORMAN V. UNITED STATES, AND THIS COURT SHOULD CLARIFY THE HOLDINGS OF THOSE CASES WITH RESPECT TO THE EFFECT OF A REVERSAL OF A JUDGMENT OF CONVICTION BY AN APPELLATE COURT FOR INSUFFICIENCY OF THE EVIDENCE AND THE CIRCUMSTANCES UNDER WHICH A NEW TRIAL MAY OR MAY NOT BE ORDERED.

We have heretofore discussed the three cases decided by this court bearing upon the question of whether a defendant may be subjected to a retrial following an appellate reversal for insufficiency of the evidence (see Bryan v. United States, Sapir v. United States, and Forman v. United States, supra). This court should settle the important questions presented by this petition so as

to avoid continued confusion and uncertainty among the circuit courts of appeal.

The uncertainty that exists among the lower federal courts was perhaps best expressed by the United States Court of Appeals for the Fifth Circuit in United States v. Musquiz, 445 F.2d 963 (5th Cir. 1971), where the court held:

> "The only remaining question is whether the appellant is to be retried. Whether, and under what circumstances, a Court of Appeals should permit an accused to be retried when his conviction has been reversed for lack of evidence to support the verdict is a question of some uncertainty. Compare Bryan v. United States, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950) with Sapir v. United States, 348 U.S. 373, 75 S.Ct. 422, 99 L.Ed. 426 and Forman v. United States, 361 U.S. 416, 426, 80 S.Ct. 481, 487, 4

L.Ed.2d 412 (1960). The distinction between Bryan, on the one hand, and Forman and Sapir on the other, seems to turn, under the present state of the law at least, on whether the defendant made a motion for a new trial in the district court. See Wright, Federal Practice and Procedure: Criminal Section 470 (1960). See e.g., United States v. Goodson, 5th Cir. 1971, 439 F.2d 1056.

"Since the instant appeal is from the denial of appellant's motion for acquittal, and the Record reveals that appellant made no motion for a new trial, under Forman and Sapir, supra, no retrial should be permitted. We have concluded that the circumstances of the case warrant our direction that on remand the indictment be dismissed. See United States v. Barfield, 5th Cir. 1971, ___F.2d___; United States v. Goodson, supra; United States v. Johnson, supra.

Accordingly, appellant's conviction is reversed and remanded with directions to dismiss the indictment."

Phillips v. United States, 311 F.2d 204 (10th Cir. 1962), involved a Dyer Act Prosecution reversed for insufficiency of the evidence because the government failed to sustain its burden of proving beyond a reasonable doubt that defendant's sanity was put in issue. Defendant made no motion for a directed verdict.

The Court of Appeals for the 10th Circuit apparently also felt that the issue hinges upon whether or not the defendant moved for a new trial, for it said:

"Since, however, the defendant has moved for a new trial, the case is open for such disposition here as seems appropriate and just under the circumstances. See Bryan v. United States, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335; Sapir v.

United States, 348 U.S. 373, 75 S.Ct. 422, 99 L.Ed. 426; Thomas v. United States, 10 Cir., 239 F.2d 7; Douglas v. United States, 99 U.S.App.D.C. 232, 239 F.2d 52."

III

ASSUMING, ARGUENDO, THAT A RETRIAL OF PETITIONER FOLLOWING A REVERSAL FOR LACK OF EVIDENCE WHERE NO MOTION FOR NEW TRIAL WAS MADE, WOULD NOT SUBJECT PETITIONER TO DOUBLE JEOPARDY, THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER A RETRIAL OF PETITIONER WOULD VIOLATE THE ESSENTIAL FAIRNESS OF PROCEEDINGS IN THE FEDERAL COURTS IN VIEW OF THE FACTS AND CIRCUMSTANCES OF THIS CASE.

In United States v. Dotson, 440 F.2d 1224 (10th Cir. 1971), motions for judgment of acquittal and for a new trial were made on the ground that the government had failed to establish an essential element of the offense. Both

motions were denied and an appeal followed a jury verdict of guilty. Prior to oral argument, the government conceded its failure of proof and moved to remand for a new trial. The appellant suggested that the conviction should be reversed and a judgment of acquittal entered.

The Court of Appeals, "harboring no reservations" that it could either remand for a new trial (citing Bryan v. United States and Forman v. United States), or reverse with instructions to enter a judgment of acquittal, (citing Sapir v. United States), directed entry of a judgment of acquittal, saying:

> "Dotson properly moved for a judgment of acquittal, alleging insufficient evidence. By admission of the government, the trial court should have sustained the motion. If the motion had then been granted or had the jury acquitted Dotson, the Fifth Amendment would clearly prohibit a second attempt at

prosecution. Green v. United States, 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). We are unable to perceive why the government's position should be improved by failing to recognize the defect until the appeal stage. If the defendant should have been acquitted for insufficient proof, he ought not be subsequently penalized for his effort to rectify the original error.

"The motion by the United States to remand for a new trial is denied; the conviction is reversed and the case is remanded with direction to enter a judgment of acquittal."

This instant prosecution is unique in that the government, although afforded the opportunity to do so, deliberately bypassed its opportunity to obtain medical reports in advance of trial or to present evidence (expert or lay), on the issue of sanity. This is demonstrated by the following:

1. When the defendant in the court below filed a motion for pretrial discovery pursuant to Federal Rules of Criminal Procedure (16)(a)(2) requesting "results or reports of physical or mental examinations" (Cl.Tr. p. 2, No. 2), the government was entitled to reciprocal discovery pursuant to Federal Rules of Criminal Procedure No. 16(c). The government, in responding to the defendant's motions, deliberately bypassed its opportunity to obtain, in advance of trial, the medical reports and tests testified to by Dr. Weaver (Cl.Tr. pp. 33-36).

It must be recalled that Dr. Weaver described certain psychological tests which had been administered to Mr. Sobel on September 17, 1969 by Dr. McBroom (Rep.Tr. pp. 298, 299-303) approximately one year prior to trial.

2. One day prior to the testimony of Dr. Weaver government counsel presented a Motion to Compel Defendant to Submit to Psychiatric Examination and Order (Cl.Tr. pp. 76-81) to the court. Government counsel informed the court

that should its motion be granted he had already made an appointment with one of the psychiatrists on the panel who could examine the defendant at 8:00 A.M. the following morning and have a report ready by 1:00 P.M. that afternoon so that proceedings would not be delayed (Rep.Tr. p. 273).

After hearing argument, the court ruled that it would grant the government's motion (Rep.Tr. p. 280) and appointed Dr. Marcus Crahan, the government's choice of an examining psychiatrist (Rep.Tr. p. 282) even though defense counsel objected to Dr. Crahan on the grounds that he was a hand-picked pro-government psychiatrist (Rep.Tr. p. 280).

After Dr. Weaver's testimony had been concluded, it was agreed that the government's expert witness, Dr. Crahan, would be furnished with all of the materials that had been furnished to Dr. Weaver as a basis for his conclusion. The court then inquired of government counsel if it was his intention to call Dr. Crahan the next morning and

government counsel asked for a 10 minute recess to make a decision on that matter because, "I may have reconsidered calling Dr. Crahan." (Rep.Tr. p. 359). When the recess had been concluded and several other matters, including a denial of the defendant's motion for judgment of acquittal, had been determined between the court and counsel, government counsel moved to withdraw his motion for the appointment of a psychiatrist, which motion was granted by the court (Rep.Tr. p. 347).

The government, in withdrawing said motion after having it granted by the court with all arrangements made therefor, deliberately bypassed its opportunity to present expert testimony on the issue of sanity.

3. The government presented no lay testimony on the issue of sanity although such testimony was available through Agent Tarallo and Deputy Collier. It should also be of considerable interest to note that the government had available as a witness Myrna Courtney (Rep.Tr. p. 180) through whom both

Agent Tarallo and Deputy Collier were introduced to the defendant-appellant. Surely Myrna Courtney, because of her long association with the defendant-appellant, could have been in a position to testify as to his sanity or lucidity.

The government in not calling lay witnesses to testify as to Sobel's sanity, although such witnesses were available, deliberately bypassed its opportunity to present relevant lay testimony on the issue of sanity.

The Ninth Circuit has held that under such circumstances a retrial would be unfair to a successful appellant. In United States v. Howard, 432 F.2d 1188, 1190 (9th Cir. 1970), a concurring opinion by two members of the panel made the following observation which would be directly in point in this case:

> "When a judgment of conviction is reversed for insufficiency of the evidence, the determination of whether the indictment should be

dismissed or there should be a retrial rests within the sound discretion of the court. See e.g., Bryan v. United States, 338 U.S. 552, 70 S.Ct. 317, 94 L.Ed. 335 (1950); C. Wright, Federal Practice & Procedure, Criminal (Section 470). When an appellant court exercises this discretion, it must look to the record, undertaking to ascertain if the prosecution had the opportunity fully to develop its case, or in fact did so. If it did, or if it appears that it was responsible for its failure adequately so to do, then it is not ordinarily fair that the successful appellant should be required to undergo another trial."
(Emphasis supplied).

In relying on Bryan v. United States, supra, the court above quoted did not consider the later concurring opinion in Sapir v. United States, supra, which

was approved by that Circuit in Forman v. United States, supra, and by the United States Supreme Court in the same case after certiorari had been granted, Forman v. United States, supra.

Even if this court should conclude that the retrial of the defendant-appellant herein would not violate the command of the Fifth Amendment relating to double jeopardy, it would, under the criteria set forth in United States v. Howard, supra, and the facts in this case, be impermissibly unfair.

It should further be noted that in Buatte v. United States, 330 F.2d 342 (9th Cir. 1964) and the cases primarily relied upon in that decision[10/] as well as the only decision following Buatte v. United States, supra, where the Ninth Circuit reversed a conviction because

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10/ McKenzie v. United States, 266 F.2d 524 (10th Cir. 1959); United States v. Westerhausen, 283 F.2d 844 (7th Cir. 1960); Argent v. United States, 325 F.2d 162 (5th Cir. 1963); Isaac v. United States, 284 F.2d 168, (D.C. Cir. 1960).

the prosecution failed to sustain its burden of proof,[11] the convictions were in each case reversed with directions to grant the defendant's motion for judgment of acquittal.

This case was at least as strong as any of those above cited, and is the only case where the government deliberately bypassed the opportunity to prepare for and present expert and lay testimony at the trial in the court below.

1. The government in this case deliberately chose to bypass its opportunity to present evidence or proof, if any there was, to overcome the petitioner's strong evidence of insanity;

2. It must be noted that in the government's response to the petition for rehearing, Appendix C, it stated that if given an opportunity to retry the petitioner herein, it would call the psychiatrist to examine the petitioner, conceding that it had an opportunity to do so but failed to do so

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[11] Hartford v. United States, 362 F.2d 63 (9th Cir. 1966).

during the course of the trial. In its response to the petition for rehearing, Appendix C, the government is conceding that it made a tactical error and now wants the opportunity to correct that error while not even alleging that it had any reason to believe that a psychiatrist of its own choice would or could make different findings than the defense psychiatrist. This is manifestly unfair for it stands to reason that a defense counsel who makes an error in tactics is not, after conviction, given an opportunity to call a witness he deliberately chose not to call; and

3. The District Court in this case deliberately failed to obey its oath and follow the law when it stated to defense counsel that it would not follow the reasoning of the Court of Appeals in its own circuit. It is submitted that to subject the appellant to retrial under these circumstances is manifestly unfair and rewards the government where a judge deliberately disobeys the mandate of the Court of

Appeals and/or this Honorable Court.

As in United States v. Dotson, supra, the government's position here should not be improved by virtue of its own deliberate failure in the production of evidence and by the trial court's failure to follow the applicable law. It is respectfully submitted that under its supervisory authority of proceedings in the federal courts (see McNabb v. United States, 318 U.S. 332, and Mesarosh v. United States, 352 U.S. 1 (1956)), this court should grant certiorari for the purpose of holding that under the facts and circumstances of this case, a retrial of the petitioner herein would be manifestly unfair and that the court of appeals should have, in reversing the judgment of conviction; also directed the entry of a judgment of acquittal.

IV

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER PETITIONER WAS DENIED EQUAL PROTECTION OF THE LAW BY THE COURT OF APPEALS REVERSING HIS JUDGMENT OF CONVICTION WITHOUT DIRECTING ENTRY OF A JUDGMENT OF ACQUITTAL WHILE IN OTHER SIMILAR CASES HAVING REVERSED WITH DIRECTIONS THAT PRECLUDED A RETRIAL.

We have pointed out, in preceding paragraphs, that the Court of Appeals for the Ninth Circuit has, in other cases involving far weaker factual settings, reversed judgments of conviction with specific directions which have precluded retrials.

In reversing the judgment of conviction of petitioner herein, the Court of Appeals merely reversed without commenting upon or deciding whether or not petitioner should be required to undergo a retrial under the applicable

criteria as set forth in the concurring opinion in United States v. Howard, supra. Petitioner herein was thus subjected to an unequal application of the law.

V

THIS COURT SHOULD GRANT CERTIORARI FOR THE PURPOSE OF SETTING FORTH STANDARDS AND LAYING DOWN GUIDELINES UNDER ITS SUPERVISORY AUTHORITY OVER THE FEDERAL COURTS AS TO THE CRITERIA TO BE APPLIED BY COURTS OF APPEAL IN DETERMINING WHETHER OR NOT TO DIRECT THE ENTRY OF A JUDGMENT OF ACQUITTAL OR REMAND FOR A NEW TRIAL IN SITUATIONS WHERE THE COURT OF APPEALS HAS REVERSED A JUDGMENT OF CONVICTION FOR INSUFFICIENCY OF THE EVIDENCE.

For the reasons which have been discussed supra, and in view of the confusion that has been engendered not only among the various federal circuits but within the circuits themselves as

to the circumstances under which a new trial should or should not be granted where a judgment of conviction is reversed for insufficiency of the evidence, this court should grant certiorari for the purpose of establishing standards and guidelines to be applied by the lower federal courts in such instances.

While the Courts of Appeal have had occasions to deal with reversals for insufficiency of the evidence in numerous cases, it appears evident that few standards and much confusion exists in the Circuit Courts of Appeal as to whether and under what circumstances a retrial should or should not ensue. All this aside from the uncertainty that exists as to whether a retrial is permissible at all where the defendant made no motion for a new trial.

Representative cases, listed by circuits, in which varying dispositions were made for varying reasons are:

1st Circuit

Gikas v. United States, 250 F.2d 858 (1st Cir. 1957); Amador Beltran v. United States, 302 F.2d 48 (1st Cir. 1962).

2d Circuit

United States v. Russano, 257 F.2d 712 (2d Cir. 1958).

3d Circuit

United States v. Kram, 247 F.2d 830 (3d Cir. 1957); United States v. Renee Ice Cream Company, 160 F.2d 353 (3d Cir. 1947).

4th Circuit

United States v. Williams, 348 F.2d 451 (4th Cir. 1965).

5th Circuit

United States v. Goodson, 439 F.2d 1056 (5th Cir. 1971);

United States v. Musquiz, 445 F.2d 1963 (5th Cir. 1971);

Watkins v. United States, 409 F.2d 1382 (5th Cir. 1969);

Hamilton v. United States, 304 F.2d 542 (5th Cir. 1962);

Clark v. United States, 293 F.2d 445 (5th Cir. 1961);

Thompson v. United States, 334 F.2d 207 (5th Cir. 1964);

Guevara v. United States, 242 F.2d 745 (5th Cir. 1957);

Miller v. United States, 224 F.2d 561 (5th Cir. 1955);

Argent v. United States, 325 F.2d 162 (1963).

6th Circuit

Carr v. United States, 278 F.2d 702 (6th Cir. 1960);

United States v. Stroble, 431 F.2d 1273 (6th Cir. 1970);

United States v. Dunn,
299 F.2d 548 (6th Cir. 1962).

7th Circuit

United States v. Westerhausen,
283 F.2d 844 (1960).

8th Circuit

Sentner v. United States,
253 F.2d 310 (8th Cir. 1958).

9th Circuit

Davis v. United States, 382 F.2d 221 (9th Cir. 1967);
Ramirez v. United States,
363 F.2d 33 (9th Cir. 1966);
United States v. Mayer, 441 F.2d 322 (9th Cir. 1971);
Julian v. United States,
391 F.2d 279 (9th Cir. 1968);
United States v. Howard,
432 F.2d 1188 (1970);
Buatte v. United States,
330 F.2d 342 (1964);

Spriggs v. United States,
225 F.2d 865 (1955)

10th Circuit

Thomas v. United States, 239 F.2d 7 (10th Cir. 1956);

United States v. Dotson, 440 F.2d 1225 (10th Cir. 1971);

McKenzie v. United States, 266 F.2d 524 (1959).

D.C. Circuit

Rucker v. United States, 288 F.2d 146 (D.C. Cir. 1961);

Austin v. United States, 382 F.2d 129 (D.C. Cir. 1967);

Curry v. Overholser, 287 F.2d 137 (D.C. Cir. 1960);

Fielding v. United States, 251 F.2d 878 (D.C. Cir. 1957);

Douglas v. United States, 239 F.2d at page 60 (D.C. Cir.);

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. NO. 71-1124
MORTON MAYER SOBEL,
Appellant.

On Appeal from the United States
District Court for the
Central District of California

Before: CHAMBERS, HAMLEY and CHOY, Circuit Judges.

PER CURIAM:

The judgment of conviction is reversed.

We find the government, once sanity was an issue, did not sustain its burden of proof.

No. 71-1124

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

MORTON MAYER SOBEL,

Appellant.

Petition for Rehearing and Suggestion for Appropriateness of Hearing En Banc.

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TOPICAL INDEX

Page

Preliminary Statement 1

I.

Where the Issue of Sanity Is Raised by the Defendant and the Government Deliberately Foregoes Its Opportunity to Contest the Issue Which Results in the Judgment of Conviction Being Reversed by the Court of Appeals Because the Government Failed to Sustain Its Burden of Proof a Retrial Would Violate the Command of the Fifth Amendment Relating to Double Jeopardy 3

II.

Even if This Honorable Court Does Not Agree That the Appellant's Retrial Would Violate the Command of the Fifth Amendment Relating to Double Jeopardy, a Retrial Should Nonetheless Be Barred Because the Prosecution Deliberately Bypassed Its Opportunity to Obtain Pretrial Production of the Defendant's Medical Tests and Reports or Present Evidence (Both Expert and/or Lay) in the Trial of This Case .. 4

III.

Suggestion for Rehearing En Banc 8

Conclusion 9

TABLE OF AUTHORITIES CITED

Cases	Page
Argent v. United States, 325 F. 2d 162	8
Bryan v. United States, 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335	7
Buatte v. United States, 330 F. 2d 342	8
Buatte v. United States, 331 F. 2d 848	3, 8
Davis v. United States, 165 U.S. 332	3
Forman v. United States, 264 F. 2d 955	4, 7
Hartford v. United States, 362 F. 2d 63	8
Isaac v. United States, 284 F. 2d 168	8
McKenzie v. United States, 266 F. 2d 524	8
Sapir v. United States, 348 U.S. 373, 75 S. Ct. 422, 99 L. Ed. 426	4, 7
United States v. Howard, 432 F. 2d 1188	7, 8
United States v. Westerhausen, 283 F. 2d 844	8
Rules	
Federal Rules of Appellate Procedure, Rule 40	1
Federal Rules of Criminal Procedure, Rule 16(a)(2)	5
Federal Rules of Criminal Procedure, Rule 16(c)	5
Statutes	
United States Code, Title 28, Sec. 2106	2
United States Constitution, Fifth Amendment	2, 3, 4, 8

No. 71-1124

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*

vs.

MORTON MAYER SOBEL, *Appellant.*

Petition for Rehearing and Suggestion for Appropriateness of Hearing En Banc.

To the Honorable Judges: Chambers, Hamley and Choy of the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the appellant herein respectfully petitions this court for rehearing in the above captioned case. The judgment of the court was entered on July 15, 1971 and by order of Judge Chambers, dated July 30, 1971 and filed July 30, 1971, the appellant has to and including August 10, 1971 in which to file this petition.

PRELIMINARY STATEMENT.

Oral argument in the instant case was held on July 13, 1971 at 2:00 P.M. On July 15, 1971 the following *per curiam* opinion was filed:

> "The judgment of conviction is reversed. We find the government, once sanity was an issue, did not sustain its burden of proof."

The Court, by this brief *per curiam* opinion, clearly found that the government, once sanity was put in issue by the defendant, failed *as a matter of law* to prove the defendant's sanity beyond a reasonable doubt and that the defendant should have been entitled to an acquittal in the court below.

Now the question arises as to whether or not the defendant-appellant can be retried on the same offenses because this court did not direct either a retrial, a dismissal of the indictment or a direction to grant the defendant-appellant's motion for judgment of acquittal upon remand pursuant to 28 U.S.C. Section 2106.

It is respectfully submitted that the appellant herein cannot and should not be subjected to a retrial in this case for each of the following reasons which will be set forth more fully below:

1. To subject the appellant to a retrial would violate the command of the Fifth Amendment relating to double jeopardy.

2. To subject the appellant to a retrial would be unfair in view of the fact that the government *deliberately bypassed* the opportunity to meet its burden of proof in the court below through the introduction of expert and lay testimony on the issue of sanity.

There is also a suggestion for rehearing *en banc* because this issue has never been precisely resolved in this or any other Circuit, or for that matter by the United States Supreme Court and is an issue of substantial Constitutional dimension.

I.

Where the Issue of Sanity Is Raised by the Defendant and the Government Deliberately Foregoes Its Opportunity to Contest the Issue Which Results in the Judgment of Conviction Being Reversed by the Court of Appeals Because the Government Failed to Sustain Its Burden of Proof a Retrial Would Violate the Command of the Fifth Amendment Relating to Double Jeopardy.

This very question was raised by and considered by the Ninth Circuit Court of Appeals on the government's petition for rehearing in *Buatte v. United States*, 331 F. 2d 848 (9th Cir. 1964). The Court in that case denied the appellee's petition for rehearing on the ground that the items cited in said petition would not suffice to meet the requirements of *Davis v. United States*, 165 U.S. 332 (1897) and then went on to make the following observation:

> "Since we take this view of the petition and deny it upon that ground, it is unnecessary for us to consider the further question whether in the circumstances of this case, since this court has held that judgment of acquittal for lack of evidence should have been entered and has reversed the judgment on that ground, the granting of a new trial would violate the command of the Fifth Amendment relating to double jeopardy. See the concurring opinion in Sapir v. United States, 348 U.S. 373, 75 S. Ct. 422, 99 L. Ed. 426, as commented upon in Forman v. United States, 361 U.S. 416, at page 426, 80 S. Ct. 481, 4 L.

Ed. 2d 412, and see 'Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence' 31 University of Chicago Law Review 365."

All of the above authorities stand clearly for the proposition that where a reversal is based upon insufficiency of the evidence and can only be cured by introduction of new evidence and where no motion for new trial was made (all as in the case at bar) the command of the Fifth Amendment relating to double jeopardy must be obeyed and the successful appellant cannot be subjected to a retrial.

This should be especially true where as here, the government deliberately bypassed its opportunity to obtain pretrial production of the defendant's medical tests and reports or present expert and/or lay testimony in the trial of this case as is more fully set forth *infra* in Number II below.

II.

Even if This Honorable Court Does Not Agree That the Appellant's Retrial Would Violate the Command of the Fifth Amendment Relating to Double Jeopardy, a Retrial Should Nonetheless Be Barred Because the Prosecution Deliberately Bypassed Its Opportunity to Obtain Pretrial Production of the Defendant's Medical Tests and Reports or Present Evidence (Both Expert and/or Lay) in the Trial of This Case.

The instant prosecution is unique in that the government although afforded the opportunity to do so,

The Ninth Circuit Court of Appeals also appeared to quote the concurring opinion in *Sapir v. United States*, *supra*, with approval in *Bowser v. United States*, 264 F. 2d 955, 956 (9th Cir. 1959).

deliberately bypassed its opportunity to obtain medical reports in advance of trial or to present evidence (expert or lay) on the issue of sanity. This is demonstrated by the following:

1. When the defendant in the court below filed a motion for pretrial discovery pursuant to Federal Rules of Criminal Procedure (16)(a)(2) requesting "results or reports of physical or mental examinations" [Clk. Tr. p. 2, No. 2], the government was entitled to reciprocal discovery pursuant to Federal Rules of Criminal Procedure No. 16(c). The government, in responding to the defendant's motions, deliberately bypassed its opportunity to obtain, in advance of trial, the medical reports and tests testified to by Dr. Weaver [Clk. Tr. pp. 33-36].

It must be recalled that Dr. Weaver described certain psychological tests which had been administered to Mr. Sobel on September 17, 1969 by Dr. McBroom [Rep. Tr. pp. 298, 299-303] approximately one year prior to trial.

2. One day prior to the testimony of Dr. Weaver government counsel presented a Motion to Compel Defendant to Submit to Psychiatric Examination and Order [Clk. Tr. pp. 76-81] to the court. Government counsel informed the court that should its motion be granted he had already made an appointment with one of the psychiatrists on the panel who could examine the defendant at 8:00 A.M. the following morning and have a report ready by 1:00 P.M. that afternoon so that proceedings would not be delayed [Rep. Tr. p. 273].

After hearing argument, the court ruled that it would grant the government's motion [Rep. Tr. p. 280] and appointed Dr. Marcus Crahan, the government's choice

of an examining psychiatrist [Rep. Tr. p. 282] even though defense counsel objected to Dr. Crahan on the grounds that he was a hand-picked pro-government psychiatrist [Rep. Tr. p. 280].

After Dr. Weaver's testimony had been concluded, it was agreed that the government's expert witness, Dr. Crahan, would be furnished with all of the materials that had been furnished to Dr. Weaver as a basis for his conclusion. The Court then inquired of government counsel if it was his intention to call Dr. Crahan the next morning and government counsel asked for a 10 minute recess to make a decision on that matter because, "I may have reconsidered calling Dr. Crahan." [Rep. Tr. p. 359]. When the recess had been concluded and several other matters, including a denial of the defendant's motion for judgment of acquittal, had been determined between the court and counsel, government counsel moved to withdraw his motion for the appointment of a psychiatrist, which motion was granted by the court [Rep. Tr. p. 347].

The government, in withdrawing said motion after having it granted by the court with all arrangements made therefor, deliberately bypassed its opportunity to present expert testimony on the issue of sanity.

3. The government presented no lay testimony on the issue of sanity although such testimony was available through Agent Tarallo and Deputy Collier. It should also be of considerable interest to note that the government had available as a witness Myrna Courtney [Rep. Tr. p. 180] through whom both Agent Tarallo and Deputy Collier were introduced to the defendant-appellant. Surely Myrna Courtney, because of her long association with the defendant-appellant, could have been in a position to testify as to his sanity or lucidity.

The government in not calling lay witnesses to testify as to Sobel's sanity, although such witnesses were available, deliberately bypassed its opportunity to present relevant lay testimony on the issue of sanity.

This Honorable Court has held that under such circumstances a retrial would be unfair to a successful appellant. In *United States v. Howard*, 432 F. 2d 1188, 1190 (9th Cir. 1970), a concurring opinion by two members of the panel made the following observation which would be directly in point in this case:

> "When a judgment of conviction is reversed for insufficiency of the evidence, the determination of whether the indictment should be dismissed or there should be a retrial rests within the sound discretion of the court. See, e.g., Bryan v. United States, 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335 (1950); C. Wright, Federal Practice & Procedure, Criminal (Section 470). When an appellate court exercises this discretion, it must look to the record, undertaking to ascertain *if the prosecution had the opportunity fully to develop its case, or in fact did so. If it did; or if it appears that it was responsible for its failure adequately so to do, then it is not ordinarily fair that the successful appellant should be required to undergo another trial.*" (Emphasis supplied).

In relying on *Bryan v. United States, supra*, the court above quoted did not consider the later concurring opinion in *Sapir v. United States, supra*, which was approved by this Circuit in *Forman v. United States, supra*, and by the United States Supreme Court in the same case after certiorari had been granted, *Forman v. United States, supra*.

Even if this court should conclude that the retrial of the defendant-appellant herein would not violate the command of the Fifth Amendment relating to double jeopardy, it would, under the criteria set forth in *United States v. Howard, supra,* and the facts in this case, be impermissibly unfair.

It should further be noted that in *Buatte v. United States,* 330 F. 2d 342 (9th Cir. 1964) and the cases primarily relied upon in that decision as well as the only decision following *Buatte v. United States, supra,* where the Ninth Circuit reversed a conviction because the prosecution failed to sustain its burden of proof,[2] the convictions were in each case reversed with directions to grant the defendant's motion for judgment of acquittal.

This case was at least as strong as any of those above cited, and is the only case where the government deliberately bypassed the opportunity to prepare for and present expert and lay testimony at the trial in the court below.

III.

Suggestion for Rehearing En Banc.

It is respectfully submitted that the issues posed in this instant petition for rehearing raise Constitutional questions of substantial dimension and are worthy of consideration by this Honorable Court En Banc.

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[2] *McKenzie v. United States,* 266 F.2d 524 (10th Cir. 1959); *United States v. Westerhausen,* 283 F. 2d 844 (7th Cir. 1960); *Argent v. United States,* 325 F. 2d 162 (5th Cir. 1963); *Isaac v. United States,* 284 F. 2d 168, (D.C. Cir. 1960).

[3] *Hartford v. United States,* 362 F. 2d 63 (9th Cir. 1966).

Conclusion.

The opinion of this Honorable Court dated July 15, 1971 should be clarified to provide for a granting of the appellant's motion for judgment of acquittal upon remand and to clear up any possible misunderstanding by the court below of the import and meaning of said opinion.

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N O. 71-1124

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MORTON MOYER SOBEL,

Defendant-Appellant.

GOVERNMENT'S RESPONSE
TO APPELLANT'S PETITION FOR REHEARING
AND APPROPRIATENESS OF HEARING EN BANC

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TOPICAL INDEX

	Page
PRELIMINARY STATEMENT	1
ISSUES PRESENTED	2
I THE GRANTING OF A RETRIAL WOULD NOT VIOLATE THE COMMAND OF THE FIFTH AMENDMENT RELATING TO DOUBLE JEOPARDY	2
II A RETRIAL SHOULD BE ORDERED IN THIS CASE	3
CONCLUSION	4

TABLE OF AUTHORITIES

Cases

Davis v. United States, 165 U.S. 373	2
Howard v. United States, 372 F.2d 294 (1967)	2, 4

Constitution

United States Constitution	
Fifth Amendment	2

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AND APPROPRIATENESS OF HEARING EN BANC

PRELIMINARY STATEMENT

On July 15, 1971 the following per curiam opinion was filed in the instant case by the United States Court of Appeals for the Ninth Circuit.

"The judgment of conviction is reversed.

We find the government, once sanity was on issue, did not sustain its burden of proof."

The defendant should be subjected to a retrial in this case. A retrial would allow the government the opportunity to have the defendant examined by a court-appointed psychiatrist to determine the defendant's sanity or insanity, which evidence would suffice to

deemed to have waived the constitutional protection against double jeopardy.

II

A MISTRIAL SHOULD BE ORDERED IN THIS CASE

The government did bypass the opportunity to have the defendant examined by a court-appointed psychiatrist who could in turn testify concerning his findings in court. This decision was based on the government's contention that the proper opinion of the defense psychiatrist, Dr. Weaver, was going to be based on an incorrect view of the facts and therefore his testimony would be rejected by the trier of facts. (Reporter's transcript pp. 140-142, 147-149, also see Appellee's Brief in the instant case pp. 17-18).

The testimony of Bureau of Narcotics and Dangerous Drugs Agent Tarallo and Deputy Sheriff Collins showed that the defendant was actively engaged in the sale of narcotics. It is submitted by the government that no evidence presented by the defense would provide sufficient evidence to cause the trier of fact to believe the defendant to be insane.

The medical reports of the appellant were sought by the government in advance of the trial as there was no indication from any information in the hands of the

government at that time that the issue of insanity was to be raised by the defense.

The burden on the defendant to defend himself in a subsequent trial is far outweighed by the interest of society in [illegible] preventing the guilty from escaping just punishment." Howard v. United States, supra at 299.

CONCLUSION

No Rehearing En Banc is sought by the government. The government requests a modification of the opinion of this Honorable Court dated July 15, 1971 to provide for a retrial in the instant case.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-809

MORTON MAYER SOBEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 443 F. 2d 1370.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1971. A petition for rehearing was denied on

October 22, 1971. Mr. Justice Douglas extended the time within which to file a petition for a writ of certiorari to December 21, 1971; the petition was filed on December 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals was obliged to enter a judgment of acquittal in this case following its reversal of petitioner's conviction on the ground that the government had failed to sustain its burden of proof on the issue of sanity.

STATUTE INVOLVED

28 U.S.C. 2106 provides as follows:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

STATEMENT

Petitioner was tried before a jury in the United States District Court for the Central District of California on a six-count indictment charging various sales of narcotics, in violation of 26 U.S.C. (1964 ed.) 4705 (a) and 21 U.S.C. (1964 ed.) 174. A mistrial was de-

clared after the jury had acquitted on two counts but had been unable to agree on a verdict as to the remaining four counts. By agreement of the parties, the cause was then submitted to the court for decision on the basis of the trial record. The court found petitioner guilty on the four remaining counts, and imposed a sentence of five years as to each, the terms to run concurrently (Pet. 5-7). The court of appeals reversed, stating (Pet. App. A): "We find the government, once sanity was in issue, did not sustain its burden of proof." Petitioner requested a rehearing, with the suggestion that the case be reheard *en banc*, asking the court to modify its opinion so as to preclude the possibility of a retrial (Pet. App. B). Rehearing was denied, and the district court thereafter set the case down for retrial. By order of Mr. Justice Douglas, extending the time for filing a petition for certiorari, the proceedings in the district court were stayed (Pet. 10).

The record shows that, after petitioner's lay witnesses had testified on the issue of sanity, the court granted the government's motion to require that petitioner submit the following morning to examination by a psychiatrist (Pet. 12-13). The defense that same day then called as its witness a psychiatrist who testified that, in his opinion, petitioner, as a result of mental disease, lacked substantial capacity both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law (Pet. 15-16). The defense then rested. The government indicated that it might withdraw its request for further psychiatric examination of petitioner, since such an ex-

amination would entail a delay of about a day. At this suggestion petitioner moved for a judgment of acquittal and the motion was denied. The court then granted the government's motion to withdraw its request for appointment of a psychiatrist (Pet. 16-20). The case was argued and submitted to the jury, and later to the court, as set forth above.

ARGUMENT

Petitioner contends here, as he did in his petition for rehearing below (Pet. App. B), that, upon reversal of conviction, he was entitled to a court of appeals' order preventing him from being retried. Under 28 U.S.C. 2106, an appellate court has discretion to direct the entry of an appropriate judgment or to require such further proceedings "as may be just under the circumstances." Petitioner does not attack the validity of the statute or its general applicability to appeals from criminal conviction. We submit that the statute is valid, is applicable to the problem presented here, and that the court of appeals wisely exercised its discretion in the circumstances of this case.

1. In *Bryan* v. *United States*, 338 U.S. 552, this Court traced the history of 28 U.S.C. 2106; it noted that under predecessor enactments new trials had often been directed as a matter of course upon reversal of a conviction for insufficiency of the evidence. While placing some weight on the fact that in that case (unlike here) the defendant had moved for a new trial in the district court, the Court in *Bryan* held that 28 U.S.C. 2106 had not abrogated the former practice of ordering

a new trial where just under the circumstances. A new trial, it concluded, rather than an acquittal did not violate the Double Jeopardy clause.

Petitioner argues that *Bryan* should be limited to the situation where a defendant actually requests a new trial in the trial court (in addition to seeking acquittal) so that he may be deemed to have opened "the whole record for such disposition as might be just." *Sapir* v. *United States*, 348 U.S. 373, 374 (Douglas, J., concurring). But this Court, in *Forman* v. *United States*, 361 U.S. 416, rejected any such limitation on the court of appeals' authority to order a new trial following a reversal. Thus, the Court, while indicating that an explicit request below for a new trial was a factor to be considered, held that 28 U.S.C. 2106 authorizes the granting of a new trial by appellate courts when they deem it just to do so, irrespective of the relief requested in the trial court; nor, the court added, does such action offend the Double Jeopardy Clause (361 U.S. at 425):

> Petitioner says that he does not come xxx [within] that rule [*i.e. United States* v. *Ball*, 163 U.S. 662] because he moved for a judgment of acquittal on the basis of a lack of evidence, and that his right to acquittal "matured" at that time. A new trial, however, was one of petitioner's remedies. As we said in *Bryan* v. *United States*, 338 U.S. 552, 560 (1950), where one seeks reversal of his conviction, "assigning a number of alleged errors on appeal, including denial of his motion for judgment of acquittal xxx 'there is no double jeopardy upon a new trial.'" Even though petitioner be right in

his claim that he did not request a new trial with respect to the portion of the charge dealing with the statute of limitations, still his plea of double jeopardy must fail. Under 28 U.S.C. § 2106, the Court of Appeals has full power to go beyond the particular relief sought. See *Ball* and other cases, *supra*. Nor does *Sapir* v. *United States*, 348 U.S. 373 (1955), require a different conclusion, as petitioner claims.* * *[1]

Accord: *Amador Beltran* v. *United States*, 302 F. 2d 48, 52 (C.A. 1); *Rucker* v. *United States*, 288 F. 2d 146, 147 (C.A. D.C.); *United States* v. *Nall*, 437 F. 2d 1177, 1187 (C.A. 5); *Staggers* v. *Stynchcombe*, 436 F. 2d 585 (C.A. 5); *contra*, *United States* v. *Musquiz*, 445 F. 2d 963-966 (C.A. 6).

2. Petitioner urges that in any event a new trial would not be fair under the circumstances presented here since the government deliberately bypassed the opportunity to offer evidence on the issue of sanity. But the government's decision not to delay the trial so that petitioner could be given a further psychiatric

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[1] Mr. Justice Harlan, concurring, echoed this view, stating (361 U.S. at 428): "He [petitioner] is subject to retrial solely because he appealed his conviction and because, in the circumstances disclosed by this record, such relief was just and appropriate under 28 U.S.C. § 2106. The *Ball*, *Green*, and *Bryan* cases * * * establish that the right of an appellate court to order a new trial does not turn on the relief requested by the defendant, and the *Sapir* case does not suggest such a distinction." Nor does *Buatte* v. *United States*, 330 F. 2d 342 (C.A. 9), relied on by petitioner. There the court recognized that it had the power under 28 U.S.C. 2106 to order a new trial but deemed the circumstances such that a new trial would serve no useful purpose. *Id.* at 347.

examination was based on its belief that it had demonstrated that the testimony of the defense psychiatrist was "based on an incorrect view of the facts" which it expected to "be rejected by the trier of facts" (Pet. App. C 3). Although the court of appeals concluded that this good faith assessment was mistaken, the mistake was not such as to render a retrial inappropriate. Several lower courts have indicated that the likelihood that additional evidence will be forthcoming at a future trial is a factor militating in favor of awarding a retrial rather than an acquittal under 28 U.S.C. 2106. See *United States* v. *Nall, supra; Amador Beltran* v. *United States, supra;* compare *Buatte* v. *United States, supra; United States* v. *Goodson,* 439 F. 2d 1056, 1059 (C.A. 5).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1972.

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